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Supreme Court of The United States

October Term, 1959

No. 672

ROBERT J. GRUNDLER and JOSEPH LEONID JELLY,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATE OF NORTH CAROLINA,

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BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW

This case was first passed upon by the Supreme Court of North Carolina at its Fall Term, 1958, and is reported as STATE v. GRUNDLER, 249 N. C. 399, 106 S. E. 2d 488. The Opinion of the Supreme Court of North Carolina appears also in Appendix A of the Petitioners' brief at pp. 20a - 24a.

At the Fall Term, 1959, the Supreme Court of North Carolina again passed upon this case, and the same is reported as STATE v. GRUNDLER and STATE v. JELLY, 251 N. C. 177, 111 S. E. 2d 1. The Opinion in the case also appears in the Appendix to Petitioners' brief at pp. 1a - 20a.

The Order and Judgment of the Superior Court of New Hanover County, which is a Court of general jurisdiction, and from which the Petitioners appealed to the Supreme

Court of North Carolina, where same was heard at the Spring Term, 1959, appears in the Appendix to Petitioners' brief at pp. 25a - 34a, and also appears in Volume II of the State Record certified to this Court, beginning at p. 22.

JURISDICTION

The Respondent, State of North Carolina, admits that a petition for re-hearing is not allowed in criminal cases in this State. The Petitioners invoke the jurisdiction of this Court under 28 USC 1257 (3) pertaining to Writs of Certiorari. The Respondent will endeavor to show later on in this brief that the validity of a statute of this State is not drawn in question as being repugnant to the Federal Constitution and that no title, right, privilege or immunity has been specially set up by the Petitioners or claimed by them under the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The Petitioners attempt to bring their case within a portion of the Fourteenth Amendment of the Constitution of the United States as quoted below:

"Constitution of United States, Amendment, Article XIV:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES OF NORTH CAROLINA INVOLVED

"Sec. 1-220. *Mistake, surprise, excusable neglect.*—The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon

motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion de novo: Provided, however, nothing in this section shall be construed to affect the rights of innocent purchasers for value in foreclosure proceedings where personal service is obtained."

"Sec. 15-180. *Appeal by defendant to Supreme Court.*—In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the Supreme Court; and the appeal shall be perfected and the case for the Supreme Court settled, as provided in civil actions."

"Sec. 15-181. *Defendant may appeal without security for costs.*—In all cases of conviction in the superior courts, the defendant shall have the right to appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith. Where the judge of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the Supreme Court, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission.

"And where it shall appear to the presiding judge that a defendant who has been convicted of a capital felony, or having been tried upon a bill of indictment charging a capital felony, has been convicted of a less offense, and who has prayed an appeal to the Supreme Court from the sentence of death or other sentence pronounced against him upon such conviction, is unable to defray the cost of perfecting his appeal on account of his poverty, it shall be the duty of the county in which the alleged capital felony was committed, upon the order of such judge, to pay the necessary cost of obtaining a transcript of the proceedings had and the evidence offered on the trial from the court reporter for the use of the defendant and the necessary cost of preparing the requisite copies of the record and briefs which the defendant is required to file in the Supreme Court under the rules of said court.

'The judge may fix the reasonable value of the services rendered in furnishing such transcript and preparing such copies of the record and briefs, and said copies of the record and briefs shall be prepared in the manner prescribed by the rules of the Supreme Court in pauper appeals. Provided, that this paragraph shall apply only to those cases in which counsel has been assigned by the court."

QUESTIONS PRESENTED

The Respondent: State of North Carolina, submits the following as the questions presented by this Petition for Writ of Certiorari:

(1) Did the Petitioners draw in question, specially set up or claim any constitutional right, privilege or immunity guaranteed by the Fourteenth Amendment of the Constitution of the United States?

(2) Did the Petitioners properly raise any Federal Constitutional question according to State procedure and practice that was passed upon by the Trial Court and the Supreme Court of North Carolina?

(3) Were the Petitioners at any time during their trial deprived of any constitutional rights and was their trial infected with fundamental unfairness contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF THE CASE

The Respondent, State of North Carolina, here gives a brief statement of the history of this case without any comment on the merits which is reserved for the argument, as follows:

(1) Petitioners Grundler and Jelly were indicted by the Grand Jury of New Hanover County, North Carolina, on February 1, 1958, for the rape of Opral Morris (Vol. II, pp. 37, 38; Vol. III, pp. 224, 225). Any references to Vols. I, II or III are made to the three volumes of the State Record certified by

the Clerk of the Supreme Court of North Carolina to the Clerk of the Supreme Court of the United States, and our references throughout this brief to the State Record so certified will be to one of these three volumes with the appropriate page number.

The Petitioners state in their brief that the indictments were consolidated for trial, which is true, but they also state that the Trial Court refused to grant a motion for separate trial but the Supreme Court of North Carolina which had the full trial record before it, states:

> "Defendants contend the Court was in error in consolidating the cases for trial. They insist there should have been a severance. The record does not disclose that defendants excepted to the consolidation or that they moved for a severance." (STATE v. GRUNDLER and STATE v. JELLY, 251 N. C. 177, 191; 111 S. E. 2d 1)

(2) Trial of the Petitioners before a judge and a jury was duly conducted, and on March 8, 1958, the Petitioners were convicted of the crime of rape with recommendation of life imprisonment (Vol. I, pp. 42-43; Vol III, p. 231). This being a capital offense under the law of North Carolina when the verdict is accompanied by a recommendation of life imprisonment it is mandatory that the judge give a sentence of life imprisonment instead of death.

(3) The Petitioners were represented by counsel of their own choice, the same being Mr. Aaron Goldberg and Mr. David Sinclair, and after the judgment and sentence of the Court counsel caused the appropriate motions and appeal entries to be entered in the record, and the Trial Judge signed orders allowing both Petitioners to appeal to the Supreme Court of North Carolina without paying any costs and ordered the County to pay for the necessary transcript of the record, evidence, and to pay the necessary costs of preparing the requisite copies of the record and the briefs which Petitioners are required to file under the Rules of the Supreme Court of North Carolina. In other words, the Petitioners were allowed to appeal to the highest court of the State with all necessary

records, transcripts and briefs and the cost of same being furnished free (Vol. I, pp. 43-52; Vol. III, pp. 231-239). The Court further ordered counsel to continue to appear for the Petitioners in the prosecution of the appeal.

(4) Thereafter, William Henry Grundler, the father of the Petitioner Robert J. Grundler, and the Petitioner Grundler, appeared before the Court and signed a written statement stating that they desired to withdraw the appeal which had been entered in the case in behalf of Robert J. Grundler (Vol. II, p. 14). Thereafter, Raymond F. Jelly, the brother of Petitioner Joseph L. Jelly, and Joseph L. Jelly, Petitioner, appeared before the Court and signed a statement that they desired the appeal to be withdrawn as to Joseph L. Jelly (Vol. II, p. 17). The Clerk of the Superior Court testified that he was present when Mr. Jelly and Mr. Grundler signed the withdrawal of their appeals and he asked them if they understood what they were signing and they said that they did. The Clerk also testified that he was present in the Court when the defendants were ordered to stand up and tell the Judge if they wished to abandon their appeals and that they apparently knew what they were doing (Vol. II, pp. 59-60). An account of all of these proceedings as to the withdrawal of the appeal will be found under the following references: Vol. I, pp. 43-51, Vol. II, pp. 10-17, and Vol. III, pp. 231-239. The evidence of Mr. Goldberg, who appeared for the Petitioner Grundler, as to the withdrawal of the appeal will be found reported in Vol. II, pp. 52-55; the evidence of Mr. David Sinclair, who represented Jelly, as to the withdrawal of the appeal will be found in Vol. II, pp. 55-59. The evidence of Goldberg, Counsel for Petitioner Grundler, and the evidence of Sinclair, Counsel for Petitioner Jelly, as well as the evidence of the prosecuting officer, John J. Burney, Jr., in question and answer form will be found in Vol. III, pp. 294-326.

(5) The trial judge, after examining Petitioners in open court, their counsel being present, ordered that the appeals be withdrawn, and thereafter the Petitioners filed an application to set aside this withdrawal and abandonment of appeal (Vol. I, pp. 2-8; Vol. III, pp. 240(1)-240(5)).

(6) The matter was heard and all the proceedings in connection with this motion or application are set out in Vol. I of the State Record certified to this Court, and on pp. 8-11 will be found the Order of the Judge of the Superior Court, entered the 10th day of June, 1958, from which it will be seen that the judge refused to hear the motion on the ground that he had no authority.

(7) Thereafter, the Petitioners appealed the matter to the Supreme Court of North Carolina, and the Supreme Court of North Carolina in an opinion entered on January 14, 1959 ruled that the Superior Court judge did have authority to hear the motion and to determine whether the order allowing withdrawal or abandonment of appeals should be set aside because of mistake, inadvertence or excusable neglect. This Opinion is found in the Appendix to Petitioners' brief, beginning on p. 20a.

(8) Thereafter, the matter was heard before another judge of the Superior Court, and all of these proceedings appear in Vol. II of the State Records certified to this Court. The Petitioners were fully heard before the trial judge, and the trial judge refused to set aside the order withdrawing and abandoning the appeals, and this order with its findings of fact will be found in Vol. II, pp. 22-28.

(9) From this order the Petitioners again appealed to the Supreme Court of North Carolina, and on the 11th of November, 1959, the Supreme Court of North Carolina filed its opinion upholding the order of the trial judge, and this opinion appears in the Appendix to the Petitioners' brief at pp. 1a-20a. Petitioners then filed this application for certiorari which is now before this court.

SUMMARY OF ARGUMENT

The Respondent, State of North Carolina, will argue that the Supreme Court of North Carolina did not pass upon or determine any Federal constitutional question but limited its decision to the issue stipulated and agreed upon by the

parties that "The only issue is whether or not the order revoking the order granting a right to appeal in forma pauperis, signed by the Hon. Burgwyn, J., should be set aside for mistake, inadvertence, surprise or excusable neglect." This stipulation appears on p. 31 of Vol. II; 1st paragraph of the State Record. Likewise, the trial court did not pass upon or determine any Federal constitutional question, and this is made clear by the tenth paragraph of the findings of fact made by the trial judge (see Vol. II, p. 25).

The Respondent will also argue that the Petitioners did not raise, specially set up, or draw in question, any right, privilege or immunity protected by the Federal Constitution. The first mention of a constitutional question is in the sixth Assignment of Error on p. 74 of Vol. II, and it is not based upon any exception reserved at the trial, and the trial court did not pass upon any Federal constitutional question, if, indeed, the simple assignment of error does not show what rights were infringed or in what manner.

The Petitioners filed a Supplemental Petition for a Writ of Certiorari in the Supreme Court of North Carolina on April 17, 1959, and in this Petition they asserted that Petitioners were deprived of their rights contrary to the Fifth and Fourteenth Amendments and that they were denied equal protection of the law but they did not allege in what manner this took place nor did they give any reasons (see Par. 24, Vol. III, p. 41).

Last of all, the Respondent will argue that the complete trial record shows that no constitutional rights of the Petitioners guaranteed by the Federal Constitution have been infringed at all but that the matter was tried according to the procedure and practice of the State of North Carolina, the Petitioners consciously and knowingly when accompanied by counsel and relatives withdrew their right of appeal and thereafter under the State practice attempted to have this withdrawal set aside.

ARGUMENT

I

THE PETITION REPRESENTS AN ATTEMPT ON THE PART OF THE PETITIONERS TO HAVE THIS COURT REVIEW THE MERITS OF THE STATE TRIAL.

This Court will notice from the statement of the case in the Petitioners' brief, beginning on p. 3, that the Petitioners go into the facts of the case and the merits and quote considerable evidence in question and answer form which they consider to be in their favor. The Petitioners also argue the question as to the competency of some of these questions and answers. All of this shows that Petitioners are trying to retry the case on its merits before this Court.

As to the merits of the case there was ample evidence to be submitted to the jury, and we only ask the Court, if it is interested in the merits, to read the evidence of the State in narrative form, beginning on p. 55 of Vol. I and extending to the middle of p. 66. The Supreme Court of North Carolina gives a succinct statement of the State's evidence in STATE v. GRUNDLER and STATE v. JELLY, 251 N. C. 177, 189. The State's evidence in question and answer form will be found, beginning on p. 46 of Vol. III and extending through p. 100. It is sufficient to say that there was ample evidence that the Petitioners, two marines stationed at Camp Lejeune, North Carolina, seized the prosecuting witness, a young woman whose husband was also a marine and was stationed overseas, forced her into their automobile, drove away, and each one committed an act of rape upon her. During the process of forcing her into the car, she screamed, and the scream was heard by two Air Force men; these two service men saw Jelly strike her and drag her into the car and immediately reported the matter to the police. As a result of the blows inflicted upon her the prosecuting witness had a swollen jaw, three loose teeth and her cheekbone was fractured in three places.

On p. 22 of Petitioners' brief Counsel for the Petitioners quote out of context statements made by the judge in his contentions for the State when instructing the jury. In order to be fair to the trial judge the whole charge should be read: it begins on p. 198 of Vol. III and extends to p. 223. This Court will see that beginning on p. 215 of this Volume the trial judge gave full contentions for the defendants to the effect that they had intercourse with the prosecuting witness with her consent, with further contentions as to their good character, as well as contentions as to their evidence that the prosecuting witness left the cafe with them voluntarily and voluntarily got into their automobile.

II

THE TRIAL COURT AND THE SUPREME COURT OF NORTH CAROLINA DID NOT PASS UPON OR DETERMINE ANY FEDERAL CONSTITUTIONAL QUESTION.

A casual reading of the two opinions of the Supreme Court of North Carolina will show that that Court did not pass upon or determine any Federal constitutional question. The first opinion, dated January 14, 1959, and reported as STATE v. GRUNDLER, 249 N. C. 399, 106 S. E. 2d 488, will show that the Supreme Court of North Carolina merely decided that under Sec. 1-220 of the North Carolina General Statutes the trial court did have jurisdiction to hear the application of the Petitioners, that the order of withdrawal of appeal should be set aside upon the grounds of mistake, inadvertence and excusable neglect. This is clearly a matter of State law and local State practice.

In the second opinion of the Supreme Court of North Carolina, reported as STATE v. GRUNDLER and STATE v. JELLY, 251 N. C. 177, 111 S. E. 2d 1, it is clear that the Supreme Court of North Carolina confined itself to the issue that was stipulated and agreed upon between the parties. This stipulation will be found in Vol. II, p. 31, and is as follows:

> "It was stipulated that the Defendant, Joseph Leonid Jelly, may adopt the original petition filed by Robert J. Grundler in the original cause and that the State may use the same answer as to Jelly as in the Grundler case, and it was further stipulated that the only issue is whether or not the order revoking the order granting a right to appeal in forma pauperis, signed by the Hon. Burgwyn, J., should be set aside for mistake, inadvertence, surprise or excusable neglect."

On p. 25 of Vol. II in the order and judgment of the trial judge this Court will see in Paragraph 10 of the Findings of Fact that this same stipulation is found as a fact by the trial judge.

Upon this theory of the case the Supreme Court of North Carolina in its opinion, which is now under review before this Court, said:

> "However, in this case the State and the defendants stipulated that the Court should inquire only as to whether the order of dismissal should be set aside for mistake, inadvertence, surprise or excusable neglect. It is clear that the parties brought themselves within the frame work of G. S. 1-220. The matter will be considered here upon the same theory as that adopted by the parties below. WADELL v. CARSON, 245 N. C. 669, 673, 97 S. E. 2d 222; PAUL v. NEECE, 244 N. C. 565, 570, 94 S. E. 2d 596."

On p. 187 of the official report of this opinion the Supreme Court of North Carolina comments on the fact that Petitioners did not raise any constitutional questions below, saying:

> "A careful scrutiny of the record discloses that no such question was raised in defendants' petition or at any time during the hearing below. This matter was injected for the first time on appeal. The assignment of error refers to no exception taken and to no ruling of the court. Furthermore, defendants entered into a stipulation at the hearing 'that the only issue is whether or not the order . . . should be set aside for mistake, inadvertence, surprise or excusable neglect.' * * *
>
> "The purported question was injected for the first time on appeal. The attempt to smuggle in new questions is

not approved. IRVINE v. CALIFORNIA, 347 U. S. 128, 129. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. STATE v. JONES, 242 N. C. 563, 564, 89 S. E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. EDELMAN v. CALIFORNIA, 344 U. S. 357, 358."

It is true that the Supreme Court of North Carolina did discuss the case of GRIFFIN v. ILLINOIS, 351 U. S. 12, 100 L. ed. 891, but this was merely for the purpose of saying that the case had no application. The Griffin Case, of course, could not apply because the trial judge ordered the Petitioners furnished with all necessary records without cost to them and ordered counsel to proceed to perfect the appeal; and, therefore, it would have no application because the Petitioners in a valid manner withdrew their appeal, and, therefore, waived such right.

The mere fact that the Supreme Court of North Carolina made reference to Petitioners' constitutional argument raised in the Supreme Court of North Carolina for the first time does not mean that the State Court decided a Federal question. This is clearly explained by Mr. Justice Holmes in the case of OSBORNE v. CLARK, 204 U. S. 565, 567-8, 51 L. ed 619, where the court of chancery appeals of the state clearly placed its decision on local state law but referred to the Dartmouth College Case as determinative of the fact that the educational institution was a private corporation. In that case this Court said:

> "The court of chancery appeals states the violations of the state Constitution set up in the bill, summarizes the questions presented by the bill and demurrer, and then addresses itself to answering those questions, suggesting no others, and saying nothing about the Constitution of the United States. After a statement of historical facts, it says that if the act authorizing the lease is constitutional, and the subject-matter of the act was under the control of the state, the case is at an end. If Carrick Academy is a public corporation, the state is assumed to have control. If it is a private corporation, the state Constitution is assumed to invalidate the statute by one of the clauses

set up in the bill. The judge, speaking for himself, would regard the academy as a public corporation, but he yields to the weight of the decision in the Dartmouth College Case, or, at least, to the principle of that case, according to which, as he conceives, the academy is a private corporation, and therefore exempt from a diversion from its original charter purposes, such as the act authorizing the lease is assumed to effect. The objections to such a diversion that he is considering are those that he has stated as presented by the bill. The supreme court, after stating the nature of the corporation and the relations and course of dealing of the state with it, and citing cases to prove that Carrick Academy is a public agency, *refers to the decision below and the citation there of the Dartmouth College Case only in order to show that that case was misapplied.* (Emphasis ours)

The same principle is adhered to by this Court in BLACK v. CUTTER LABORATORIES, 351 U. S. 292, 100 L. ed. 1188, 76 S. Ct. 824, where this Court held that the judgment of the state court rested on an adequate state ground irrespective of the reference to Federal decisions. In the Black Case this Court said:

"This Court, however, reviews judgments, not statements in opinions. Herb v. Pitcairn, 324 U. S. 117, 125, 126, 89 L. ed. 789, 794, 795, 65 S. Ct. 459; Morrison v. Watson, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 S. Ct. 995. See also Williams v. Norris (US) 12 Wheat. 117, 118, 120, 6 L. ed. 571, 572. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. Herb v. Pitcairn (US) supra; Williams v. Kaiser, 323 U. S. 471, 477, 89 L. ed. 398, 403, 65 S. Ct. 363."

It is clear that the Supreme Court of North Carolina referred to the case of GRIFFIN v. ILLINOIS, supra, for the purpose of showing that counsel for petitioners had misapplied the case and that North Carolina had fully met its requirements. Likewise, the Court cited BROWN v. ALLEN,

344 U. S. 443, 97 L. ed. 469, 73 S. Ct. 397, for the purpose of showing counsel for the petitioners that his view or concept of GRIFFIN v. ILLINOIS, supra, had been misapplied in that the petitioners argued that this case stood for the principle that the petitioners were entitled to appeal at any time, whereas, BROWN v. ALLEN, supra, clearly held that a period of limitation beyond which appeals to a state supreme court could not be perfected was valid and constitutional.

Since the parties stipulated that the sole issue was whether or not the order revoking and declaring the appeal to be abandoned should or should not be set aside for mistake, inadvertence, surprise or excusable neglect and since the whole case was disposed of upon that issue it is clear that the judgment of the Supreme Court of North Carolina rests upon a nonFederal ground which is independent, adequate and tenable and that was not resorted to for the mere purpose of trying to evade Federal jurisdiction.

EUSTIS v. BOLLES, 150 U. S. 361, 370, 37 L. ed. 1011;

BEREA COLLEGE v. KENTUCKY, 211 U. S. 53, 53 L. ed. 81;

FOX FILM CORP. v. MULLER, 296 U. S. 207, 210, 80 L. ed. 158;

HERB v. PITCAIRN, 324 U. S. 117, 125-126, 89 L. ed. 789.

III

THE PETITIONERS DID NOT PROPERLY PRESENT ANY QUESTION AS TO THE DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT BEFORE THE TRIAL COURT OR BEFORE THE SUPREME COURT OF NORTH CAROLINA.

When this matter was heard for the first time by the Supreme Court of North Carolina at its Fall Term, 1958 (STATE v. GRUNDLER, 249 N. C. 399, 106 S. E. 2d 488), it

is very clear that there was not even an attempt to present any constitutional question (see also Vol. I of the State Record). In the second hearing upon the sole stipulated issue as to whether the order withdrawing the appeal should be set aside because of surprise or excusable neglect the case was heard and again appealed to the Supreme Court. These proceedings have been certified to this Court as Vol. II. If the Court will examine Vol. II it will find that at no time was there presented to the trial court any Federal constitutional question or any allegation that Petitioners had been deprived of constitutional rights contrary to the Fourteenth Amendment because of fundamental unfairness in the trial. The first mention of any alleged deprivation of constitutional rights appears in the Petitioners' Assignments of Error, Paragraph No. 6, p. 74 of Vol. II, and this merely alleges a deprivation of liberty without due process of law and a denial of equal protection of the law all as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The same allegation was made in the Petition for Certiorari filed with the Supreme Court of North Carolina but this was merely an allegation, and when the case actually came before the Court we have a situation where the question appears for the first time in an assignment of error which was not based upon any exception or upon any ruling made by the trial court. The Supreme Court of North Carolina does not review constitutional questions unless they are properly raised and passed upon by the trial court (STATE v. JONES, 242 N. C. 563, 564, 89 S. E. 2d 129). It is believed that this Court has the same rule (EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387, 73 S. Ct. 293). As pointed out by the Supreme Court of North Carolina in its Opinion, this Court does not approve an attempt to smuggle in constitutional questions for the first time on an appeal (IRVINE v. CALIFORNIA, 347 U. S. 128, 129, 98 L. ed. 561, 74 S. Ct. 381).

It is beyond doubt that North Carolina's criminal code and its criminal procedure provide an adequate opportunity to raise constitutional questions since the procedure of North Carolina has been before this Court several times. There cannot be any question about the right of the Petitioners to raise

the question if they so desire, nor is there any showing in the Record that State officers prevented the Petitioners from raising such constitutional questions.

It is submitted, therefore, that all of these things must be raised in the courts below before this Court will give them consideration for this Court will only consider questions that have been adjudicated below. In WHITNEY v. CALIFORNIA, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095, Mr. Justice Brandeis explained the reviewing power of this Court in his concurring opinion, as follows:

> "Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied (Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Montana ex rel. Haire v. Rice, 204 U. S. 291, 301, 51 L. ed. 490, 495, 27 Sup. Ct. Rep. 281); but to the particular claims duly made below, and denied (Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 485-488, 56 L. ed. 1171, 1175, 1176, 32 Sup. Ct. Rep. 790). We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases with errors, although the objection was not taken in the trial court. Wiborg v. United States, 163 U. S. 632, 658-660, 41 L. ed. 289, 298, 299, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 Sup. Ct. Rep. 429. This is a writ of error to a state court. Because we may not inquire into the errors now alleged, I concur in affirming the judgment of the state court."

In YAKUS v. UNITED STATES, 321 U. S. 414, 88 L. ed. 835, 64 S. Ct. 660, in speaking of the timely assertion of alleged constitutional rights, this Court said:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neal v. Vermont, 144 U. S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; Barbour v. Georgia 249 U. S. 454, 460, 63 L. ed. 704, 707, 39 S. Ct. 316; Whitney v. California, 274 U. S. 357, 360, 362, 380, 71 L. ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even

> though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 77 L. ed. 180, 53 S. Ct. 32, 86 ALR 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in Whitney v. California, supra (274 U. S. 380, 71 L. ed. 1107, 47 S. Ct. 641), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey v. Best, 299 U. S. 1, 81 L. ed. 3, 57 S. Ct. 2, with Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717."

The rights, privileges, or immunities claimed must be set up in the State Court and denied by its decision.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480;

PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051;

THOMAS v. IOWA, 209 U. S. 258, 52 L. ed. 782;

NEW YORK EX REL. COHN v. GRAVES, 300 U. S. 308, 81 L. ed. 666.

In PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051, on p. 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

A claim of jurisdiction in the Supreme Court of the United States to review a decision of a state court cannot be sustained by reference to briefs and statements which are not a part of the record.

ZADIG v. BALDWIN, 166 U. S. 485, 41 L. ed. 1087;

MEDBERRY v. OHIO, 24 How. 413, 16 L. ed. 739;

LYNCH v. NEW YORK, 293 U. S. 52, 79 L. ed. 191.

Of course, a state must furnish fair and reasonable procedure to raise Federal constitutional questions but when the state does furnish such procedure the appellants must use this procedure. This is made clear in the case of EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387, 73 S. Ct. 293, where this Court said:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. HULBERT v. CHICAGO, 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617 (1906); MUTUAL LIFE INS. CO. v. McGREW, 188 U. S. 291, 308, 47 L. ed. 480, 484, 23 S. Ct. 375, 63 LRA 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below."

Even if it can be said that the Petitioners raised a Federal question in the trial court, such question must be pursued on appeal to the State's highest court in the manner required by local State practice.

Under these circumstances we think the statement of the Court in the case of JOHN v. PAULLIN, 231 U. S. 583, 585, 58 L. ed. 381, 383, is appropriate. This Court there said:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

See also:

C. I. O. v. McADORY, 325 U. S. 472, 477, 89 L. ed. 1741;

PARKER v. ILLINOIS, 333 U. S. 571, 92 L. ed. 886;

CENTRAL UNION TEL. CO. v. EDWARDSVILLE, 269 U. S. 190, 70 L. ed. 229;

C. & O. R. CO. v. McDONALD, 214 U. S. 191, 53 L. ed. 963;

HARDING v. ILLINOIS, 196 U. S. 78, 49 L. ed. 394.

In TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, it was held that where the State practice required a plea in abatement instead of a motion to quash that this Court would follow the State practice.

In BAILEY v. ANDERSON, 326 U. S. 203, 207-7, 90 L. ed. 3, this Court said:

> "Inspection of the record does not show that, in denying the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below. Such appears not to be its practice. Rule 22 of the Rules of the Supreme Court of Appeals, 181 Va lxxv; cf. Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va. 626, 628, 629, 59 S. E. 476, 17 LRA (NS) 324; Bliss v. Spencer, 125 Va. 36, 50, 99 S. E. 593, 5 ALR 619; Reynolds v. Adams, 125 Va. 295, 314, 99 S. E. 695. On this record we cannot say that the interest claimed was not included in the award, or, if it was not, that the Supreme Court of Appeals of Virginia, by denying writ of error, passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal. Jacobi v. Alabama, 187 U. S. 133, 135, 136, 47 L. ed. 106-108, 23 S. Ct. 48; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 309, 47 L. ed. 480, 485, 23 S. Ct. 375, 63 LRA 33; Chicago, I & L. R. Co. v. McGuire, 196 U. S. 128, 131, 49 L. ed. 413, 415, 25 S. Ct. 200. See Flournoy v. Wiener, 321 U. S. 253, 262, 263, 88 L. ed. 708, 714, 715, 64 S. Ct. 548, and cases cited."

In WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, this Court said:

> "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other

than a prescribed method, has been recognized as a valid exercise of state power."

See, also, the following cases:

LAYTON v. MISSOURI, 187 U. S. 356, 47 L. ed. 214;

MORRISON v. WATSON, 154 U. S. 111, 38 L. ed. 927;

BALDWIN v. KANSAS, 129 U. S. 52, 32 L. ed. 640;

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

SPIES v. ILLINOIS, 123 U. S. 131, 31 L. ed. 80.

We will not burden this brief with further discussion of this question, but we do refer the Court to certain cases which sustain our position that the State Court must be given an opportunity to pass upon constitutional questions before this Court will charge it with any errors in regard to such matters.

See:

UNITED STATES v. SPECTOR, 343 U. S. 169, 72 S. CT. 591, 96 L. ed. 863;

SPIES v. ILLINOIS, 123 U. S. 143, 8 S. Ct. 21, 31 L. ed. 80;

BROOKS v. MISSOURI, 124 U. S. 394, 8 S. Ct. 443, 31 L. ed. 454;

BALDWIN v. KANSAS, 129 U. S. 52, 9 S. Ct. 193, 32 L. ed. 640;

MORRISON v. WATSON, 154 U. S. 111, 14 S. Ct. 995, 38 L. ed. 927;

ERIE R. CO. v. PURDIE, 185 U. S. 148, 22 S. Ct. 605, 46 L. ed. 847;

LAYTON v. MISSOURI, 187 U. S. 356, 23 S. Ct. 137, 47 L. ed. 214;

LOUISVILLE & N. R. CO. v. WOODFORD, 234 U. S. 46, 34 S. Ct. 739, 58 L. ed. 1202;

WILSON v. COOK, 327 U. S. 474, 66 S. Ct. 663, 90 L. ed. 793;

WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, 75 S. Ct. 814;

PARKER v. ILLNOIS, 333 U. S. 571, 92 L. ed. 886, 68 S. Ct. 708;

PENNSYLVANIA R. CO. v. ILLINOIS BRICK CO., 297 U. S. 447, 462, 463, 80 L. ed. 769;

BAILEY v. ANDERSON, 326 U. S. 203, 90 L. ed. 3, 66 S. Ct. 66.

IV

THE PETITIONERS WERE NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT IN THE TRIAL OF THEIR CAUSE.

As we previously pointed out, the tenor of Petitioners' allegations and brief in support of same seems to be that they wish this Court to review the whole State trial and pass upon the rulings of the State trial judge as to the competency or incompetency of evidence and the legality of the trial court's statement of contentions and instructions to the trial jury. The Petitioners in their statement of the case repeatedly quote questions and answers which they say were improperly admitted or questions which they say were improperly ruled upon as to the answers. They find fault also with the trial court's instructions. Let it be said at once that there is no evidence whatsoever of a hostile atmosphere surounding the trial of the Petitioners. In fact, two members of the Air Force testified against Petitioners while other members of the Marine Corps testified or were offered as witnesses in their favor. We cannot escape the fact that the prosecuting witness was cruelly treated, beaten, had three loose teeth and her cheekbone was fractured in three places. The two witnesses that belonged to the Air Force saw these blows inflicted. The chief complaint, therefore, of the Petitioners

is really not that they were deprived of any constitutional rights but that they were caught, convicted and sentenced to prison.

We have never thought that it was the function of this Court to pass upon the competency of evidence in state trials or the validity of a trial court's instructions. There is an exception as to confessions which is not involved here.

The very same point as raised by the Petitioners in this case was decided by this Court in BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492, 63 S. Ct. 1129, where this Court said on this point, the following:

> "The petitioners insist that the rulings upon evidence and instructions to the jury, when taken in their totality, indicate that, whatever the intention of the trial judge, his rulings and attitude precluded a fair consideration of the case. The Court of Appeals held that certain of the challenged rulings and instructions were erroneous but that the errors were not substantial in the sense that they affected the ability of the jury to render an impartial verdict, and that others of the alleged errors were not such under the law of New York. As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings."

In AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639, it is said at p. 273:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

Errors of a state court in interpreting and applying the laws of that state furnish no basis for the claim that there has been a denial of due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution. The

Constitution of the United States does not guarantee that the decisions of state courts shall be free from error or require that their pronouncements shall be consistent.

DAVIS v. TEXAS, 139 U. S. 651, 35 L. ed. 300;

HOWARD v. KENTUCKY, 200 U. S. 164, 50 L. ed. 421;

WORCESTER COUNTY TRUST CO. v. RILEY, 302 U. S. 292, 82 L. ed. 268;

MILLER v. TEXAS, 153 U. S. 535, 38 L. ed. 812;

CARTER v. ILLINOIS, 329 U. S. 173, 91 L. ed. 172.

When a state court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United States Supreme Court on writ of certiorari.

NOBLE v. MITCHELL, 164 U. S. 367, 41 L. ed. 472;

AMERICAN RAILWAY EXP. CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639;

BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U. S. 30, 84 L. ed. 563.

In BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U. S. 30, 32, 84 L. ed. 563, it is stated in a *per curiam* opinion:

> "As to the first contention, it appears that the state court heard the appeal judicially and decided that there was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The following paragraph from the opinion of Justice White

in NOBLE v. MITCHELL, 164 U. S. 367, 373, 41 L. ed. 472 would seem to be decisive of the question:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. DOWER v. RICHARDS, 151 U. S. 659 (38:306); RE BUCHANAN, 158 U. S. 31 (39:884)."

If it should be determined that the Supreme Court of North Carolina erroneously decided the case, no question would be presented for determination by this Court for it has long been held that where a party is fully heard in the regular course of judicial proceedings, an erroneous decision of the state court is not a denial of due process within the Fourteenth Amendment of the Constitution of the United States.

BONNER v. GORMAN, 213 U. S. 86, 53 L. ed. 709;

AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639;

WEST OHIO GAS CO. v. PUBLIC UTILITIES COMMISSION, 294 U. S. 63, 79 L. ed. 761.

CONCLUSION

This case may be summarized as follows: The Petitioners, knowingly and consciously in open court and by signing a written statement, waived their right to appeal and asked that they be allowed to abandon their appeal. The Petitioners and their relatives had decided that if they perfected their appeal and gained a new trial they would again be tried for a capital offense which might result in death, and they did not wish to take such a chance. It was only after the father of one of the petitioners and the brother of the other petitioner had returned to their home state that they consulted other counsel and then changed their minds as to the course of action they had previously taken. The waiver made by Petition-

ers meets all the requirements of this Court, as stated in JOHNSON v. ZERBST, 304 U. S. 458, 464, 82 L. ed. 1461, and JENNINGS v. ILLINOIS, 342 U. S. 104, 109, 96 L. ed. 119, 72 S. Ct. 123. The same rule prevails in North Carolina as shown by MILLER v. STATE, 237 N. C. 29, 48, 74 S. E. 2d 513. The appeal was withdrawn under the strict requirements of the North Carolina practice as shown in STATE v. LEAK, 90 N. C. 655, and the trial judge was careful to see that the Petitioners not only advisedly consented to but desired and directed that their appeals be withdrawn.

We submit, therefore, that this Application for Certiorari does not raise any substantial Federal question; in fact, it raises no Federal question at all, and the same should be dismissed.

Respectfully submitted,

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